

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE THE ESTATE OF JUSTIN M.
MAGLEBY, Deceased, by and through
STEVEN R. MAGLEBY, Personal
Representative and on behalf of the
Estate's statutory beneficiaries,

Plaintiff,

v.

UNITED STATES OF AMERICA;
NORTHWEST HELICOPTERS, LLC,
a Washington Limited Liability
Company; MACKAY & SPOSITO
INC., a Washington Corporation,

Defendants.

CASE NO: 1:23-CV-3060-TOR

ORDER GRANTING UNITED
STATES' MOTION TO DISMISS

BEFORE THE COURT is the United States' Motion to Dismiss Pursuant to
Rules 12(b)(1) and 12(h)(3). ECF No. 32. This matter was submitted for
consideration without oral argument. The Court has reviewed the record and files
herein, the completed briefing, and is fully informed. For the reasons discussed
below, Defendants' Motion to Dismiss is granted.

1 Justin Magleby was an apprentice lineman employed by PAR Electrical
2 Contractors, LLC (“PAR”), an independent contractor hired by the Bonneville
3 Power Administration (“BPA”) to perform maintenance on the Olympia-Grand
4 Coulee transmission line in rural Kittitas County. Mr. Magleby tragically died
5 while he was performing maintenance work as a PAR employee. Tools on a ladder
6 he was descending contacted a line carrying induced voltage. PAR employees
7 failed to correctly ground the circuit before commencing work on the line and Mr.
8 Magleby did not maintain an appropriate distance from the line.

9 **I. Standard of Review**

10 The Federal Rules of Civil Procedure provide for the dismissal of a complaint
11 for lack of subject-matter jurisdiction. See Fed. R. Civ. P. 12(b)(1) and 12(h)(3).
12 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
13 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the
14 challenger asserts that the allegations contained in a complaint are insufficient on
15 their face to invoke federal jurisdiction.” *Id.* “[I]n a factual attack,” on the other
16 hand, “the challenger disputes the truth of the allegations that, by themselves,
17 would otherwise invoke federal jurisdiction.” *Id.* “In resolving a factual attack on
18 jurisdiction,” the Court “may review evidence beyond the complaint without
19 converting the motion to dismiss into a motion for summary judgment.” *Id.* The
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1 Court “need not presume the truthfulness of the plaintiff’s allegations” in deciding
2 a factual attack. *Id.*

3 The United States is immune from civil liability unless it consents to be sued.
4 *See Dalehite v. United States*, 346 U.S. 15, 30 (1953) (citing *Feres v. United*
5 *States*, 340 U.S. 135, 139 (1950)). The FTCA provides a limited waiver of that
6 sovereign immunity, under which “the United States is liable to the same extent as
7 a private party for certain torts of federal employees . . . ‘in accordance with the
8 law of the place where the act or omission occurred.’” *Autery v. United States*, 424
9 F.3d 944, 956 (9th Cir. 2005) (quoting 28 U.S.C. § 1346(b)(1)). In relevant part,
10 § 1346(b)(1) provides that the United States may be sued:

11 . . . for injury or loss of property, or personal injury or death
12 caused by the negligent or wrongful act or omission of any
13 employee of the Government while acting within the scope of his
14 office or employment, under circumstances where the United
States, if a private person, would be liable to the claimant in
accordance with the law of the place where the act or omission
occurred.

15 The FTCA’s limited waiver of sovereign immunity explicitly excludes “any
16 contractor with the United States” from its definition of “[e]mployee of the
17 government.” 28 U.S.C. § 2671 (“but does not include any contractor with the
18 United States.”). This exclusion is known as the “independent contractor
19 exception” to the FTCA. Courts have construed the independent contractor
20 exception to protect the United States from vicarious liability for the negligent acts

1 of its independent contractors. *See Yanez v. United States*, 63 F.3d 870, 872 n.1
2 (9th Cir. 1995). “Since the United States can be sued only to the extent that it has
3 waived its immunity, due regard must be given to the exceptions, including the
4 independent contractor exception, to such waiver.” *United States v. Orleans*, 425
5 U.S. 807, 814 (1976).

6 **II. Whether Private Person would be Liable under Washington Law**

7 The law as set forth by the Supreme Court of Washington in *Tauscher v.*
8 *Puget Sound Power & Light Co.*, 96 Wash. 2d 274 (1981), controls this decision.
9 In that case, an employee of an independent contractor was working on certain
10 high voltage lines for Puget Power and was electrocuted.

11 “The common law rule is that one who engages an independent contractor is
12 not liable for injuries to employees of the independent contractor resulting from the
13 contractor’s work.” *Id.* at 277. The “inherently dangerous nature” of the work
14 does not provide an exception to this rule in Washington. “When work by its very
15 nature creates some peculiar risk of injury, and the general contractor has reason to
16 know of the inherent hazards of the work, the general contractor has a duty to take
17 reasonable precautions against those hazards.” *Kelley v. Howard S. Wright Constr.*
18 *Co.*, 90 Wash.2d 323, 332 (1978); *see also Tauscher*, 96 Wash. 2d at 279 (“We
19 adhere to the rule reaffirmed in the *Epperly* case that the employer’s liability does
20 not extend to employees of independent contractors merely because of the presence

1 of inherently dangerous activities.”). “Although electrical work is considered by
2 most to be an inherently dangerous activity, it is not necessarily inherently
3 dangerous to experienced linemen.” *Tauscher*, 96 Wash. 2d. at 280.

4 Plaintiff’s endless citations to the Contract between the BPA and PAR do not
5 show that the BPA was ultimately or only responsible for safety. PAR had that
6 obligation as demonstrated by the wording in the contract. While BPA could stop
7 work for certain reasons, it was not on site and did not control the safety of every
8 employee for the independent contractor, PAR.

9 According to the Contract, PAR was “responsible for proper safety and health
10 precautions to protect the work, the workers, the public, and the property of
11 others.” *See* ECF No. 33 at ¶ 8. It was PAR’s responsibility to establish project
12 plans, provide project management, procure all materials, provide and oversee
13 safety, labor, and equipment. *Id.* at ¶ 10.

14 The multiple cases cited by Plaintiff are inapplicable to the facts of this case.

15 According to the Federal Tort Claims Act, the United States has not waived
16 sovereign immunity with respect to the allegations made against it.

17 **III. No Remaining Jurisdiction**

18 Because jurisdiction was based on the Federal Tort Claims Act, ECF No. 13,
19 First Amended Complaint, this Court no longer has jurisdiction to proceed against
20 the remaining two Defendants. There is no diversity jurisdiction. According to 28

1 U.S.C. § 1367(d), the period of limitations for any claim shall be tolled for a period
2 of 30 days after it is dismissed unless State law provides for a longer tolling period.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. The United States' Motion to Dismiss, ECF No. 32, is **GRANTED**. The
5 Complaint against the United States is **DISMISSED** with prejudice.

6 2. The Complaint against the remaining two Defendants is **DISMISSED**
7 **without prejudice**.

8 3. All deadlines, hearings and trial are **VACATED**.

9 The District Court Executive is directed to enter this Order and Judgment,
10 furnish copies to the parties, and **CLOSE** the file.

11 DATED February 29, 2024.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge